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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CANA FOUNDATION, a non-profit
corporation, LAURA LEIGH, individually, and
WILD HORSE EDUCATION, a nonprofit
corporation,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, BUREAU OF LAND
MANAGEMENT, and JON RABY, Nevada
State Director of the Bureau of Land
Management,

Defendants.

CASE NO. 2:22-cv-01200-CDS-BNW

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR JUDICIAL
NOTICE AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

First Amended Complaint Filed:
September 2, 2022

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law,
Declaration of Laurie Ford, Declaration of Jessica Blome, and exhibits attached thereto, together
with all prior pleadings and proceedings had herein, Plaintiffs hereby move this Court and

request that this Court take judicial notice of photographs taken of Blue Wing Complex gather operations, screen captures from video footage of Blue Wing Complex gather operations, a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-47 DOI-BLM-2023-002860), a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA 1278(NV954) BLM-2023-002106), a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-76 DOI-BLM-2023-004535), a veterinary report provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-76 DOI-BLM-2023-004535), Notes for 43 CFR Subtit. B, Ch. II, Subch. D, Group 4700; 51 Fed. Reg. 7410, Mar. 3. 1986; 56 Fed. Reg. 786, January 9, 1991; 43 C.F.R. §4700 et seq. (1985); and 49 Fed. Reg. 49252, Dec. 18, 1984, under Federal Rule of Evidence 201(b). This request for Judicial Notice is being filed concurrently with and in support of Plaintiffs' Motion for Summary Judgment.

DATED: December 15, 2023,

Respectfully Submitted,

s/ Jessica L. Blome

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Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs move this Court to take judicial notice of photographs taken of Blue Wing Complex gather operations, screen captures from video footage of Blue Wing Complex gather operations, a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-47 DOI-BLM-2023-002860), a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA 1278(NV954) BLM-2023-002106), a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-76 DOI-BLM-2023-004535), and a veterinary report provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-76 DOI-BLM-2023-004535). The Court may take judicial notice of these because they are relevant in establishing Defendants' violated Plaintiffs' First Amendment right to access and that BLM should either create a new Gather EA for the Blue Wing Complex or supplement the 2017 Gather EA.

This Court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)-(2). FRE 201 further provides that the Court "may take judicial notice on its own" and "must take judicial notice if a party requests it and the court is supplied with the necessary information." *Id.* at 201(c)(1)-(2).

Documents which may be considered for judicial notice pursuant to Rule 201 include legislative history documents, federal register documents, government reports, and public records. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1001 (9th Cir. 2018); *Democratic Nat'l Comm. V. Reagan*, 329 F. Supp. 3d 824, 855 n.12 (D. Ariz. 2018); *Longo v. Seminole Indian Casino Immokalee*, 813 F.3d 1348, 1349 n.2 (11th Cir. 2016); *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1294, 1320 (S.D. Cal. 2014); *FAS Capital, LLC v. Carr*, 7 F. Supp. 3d 1259, 1266 (N.D. Ga. 2014); *Experian Info. Sols., Inc.*, 633 F. Supp. 2d 1104, 1107 (C.D. Cal. 2009). Authenticated photographs also may be judicially noticed. *See McKay v. Sazerac Co.*, No. 23-cv-00522-EMC, 2023 U.S. Dist. LEXIS 86621, at *5 (N.D. Cal. May 17,

2023)

A. Photographs taken of Blue Wing Complex Gather Operations

Exhibit 1 contains two photographs taken by Laurie Ford in August of 2022 at the gather operations in the Blue Wing Complex. Ms. Ford, who is a member of Wild Horse Education, has authenticated these photographs in her declaration accompanying this motion as well as in her declaration in support of Plaintiffs' Motion for Summary Judgment. These photographs were taken from the public observation area selected by BLM, which was 1.3 to 1.8 miles from the actual trap site. Each photograph was taken with a 500 mm camera lens. The photographs are relevant to Plaintiffs' Sixth Cause of Action based upon BLM's violation of Plaintiffs' First Amendment right to access. From the photographs, it is clear that no meaningful access was provided to Plaintiffs.

B. Screen Captures from Video Footage of Blue Wing Complex Gather Operations

Exhibit 2 contains two screen captures taken by Laurie Ford from video footage she took at 3000 mm at the gather operations in August of 2022 at the Blue Wing Complex. Ms. Ford has authenticated these screen captures in her declaration accompanying this motion as well as in her declaration in support of Plaintiffs' Motion for Summary Judgment. The video was taken from the public observation area selected by BLM, which was 1.3 to 1.8 miles from the actual trap site. The screen captures are relevant to Plaintiffs' Sixth Cause of Action based upon BLM's violation of Plaintiffs' First Amendment right to access. From the screen captures, it is clear that no meaningful access was provided to Plaintiffs.

C. Spreadsheet Provided in Response to FOIA UT-2023-47 DOI-BLM-2023-002860

Exhibit 3 is a spreadsheet provided to Laurie Ford by BLM in response to her FOIA request (FOIA UT-2023-47 DOI-BLM-2023-002860) as regards burros gathered in the Blue Wing Complex in August of 2022 and shipped to Axtell Off Range Holding Corrals, which Plaintiffs were denied access to. The document is relevant to Plaintiffs' Sixth Cause of Action based upon BLM's violation of Plaintiffs' First Amendment right to access as it shows the

1 number of burro deaths occurring at the Corrals exceeds those assumed by BLM in its Blue
2 Wing Complex Gather EA and supports Plaintiffs' concern that the BLM's denial of access to
3 the Corrals is being done for an improper reason. It further is relevant to Plaintiffs' Fifth Cause
4 of Action based on NEPA because it demonstrates new data exists to warrant a new Gather EA
5 or supplementation of the 2017 Gather EA. As a public document created by BLM, judicial
6 notice is appropriate.

7 **D. Spreadsheets Provided in Response to FOIA 1278(NV954) BLM-2023-002106**

8 Exhibit 4 consists of a spreadsheet provided to Laurie Ford by BLM in response to her
9 FOIA request (FOIA 1278(NV954) BLM-2023-002106) as regards burro deaths associated with
10 the 2020 Selenite Range HA nuisance gather, which occurred within the Blue Wing Complex on
11 11/29/20. The documents are relevant to Plaintiffs' Sixth Cause of Action based upon BLM's
12 violation of Plaintiffs' First Amendment right to access as it shows the number of burro deaths
13 exceeds those assumed by BLM in its Blue Wing Complex Gather EA. It further is relevant to
14 Plaintiffs' Fifth Cause of Action based on NEPA because it demonstrates new data exists to
15 warrant a new Gather EA or supplementation of the 2017 Gather EA. As public documents
16 created by BLM, judicial notice is appropriate.

17 **E. Spreadsheet Provided in Response to FOIA UT-2023-76 DOI-BLM-2023-004535**

18 Exhibit 5 consists of a spreadsheet provided to Laurie Ford by BLM in response to her
19 FOIA request (FOIA UT-2023-76 DOI-BLM-2023-004535) as regards burro deaths associated
20 with the 2022 gather at the Sinbad HMA. The document is relevant to Plaintiffs' Sixth Cause of
21 Action based upon BLM's violation of Plaintiffs' First Amendment right to access as it shows
22 the number of burro deaths occurring at the Axtell Off Range Holding Corrals, which Plaintiffs
23 were denied access to, exceeds those assumed by BLM in its Blue Wing Complex Gather EA
24 and supports Plaintiffs' concern that the BLM's denial of access to the Corrals is being done for
25 an improper reason. It further is relevant to Plaintiffs' Fifth Cause of Action based on NEPA
26 because it demonstrates new data exists to warrant a new Gather EA or supplementation of the
27

1 2017 Gather EA. As a public document created by BLM, judicial notice is appropriate.

2 **F. Veterinary Report Provided in Response to FOIA UT-2023-76 DOI-BLM-**
3 **2023-004535**

4 Exhibit 6 consists of a veterinary report provided to Laurie Ford by BLM in response to
5 her FOIA request (FOIA UT-2023-76 DOI-BLM-2023-004535) as regards burro deaths
6 associated with the 2022 gather at the Sinbad HMA. The document is relevant to Plaintiffs' Fifth
7 Cause of Action based on NEPA as it is evidence that hyperlipidemia is often fatal in burros, and
8 based on all of the data provided by BLM, is a significant factor in the high death rates that
9 burros are experiencing. It demonstrates new data that warrants a new Gather EA or
10 supplementation of the 2017 Gather EA. As a public document provided by BLM, judicial notice
11 is appropriate.

12 **G. Notes for 43 CFR Subtit. B, Ch. II, Subch. D, Group 4700**

13 Exhibit 7, downloaded from Lexis, contains notes applicable to 43 C.F.R. §4700 et seq.,
14 which regulations were created by BLM to implement the Wild and Free-Roaming Horses and
15 Burros Act (WHA). Judicial notice is being requested as evidence that the current BLM
16 regulations were adopted in 1986, as amended in 1991. The document and these facts can be
17 accurately and readily determined from sources whose accuracy cannot reasonably be
18 questioned.

19 **H. 51 Fed. Reg. 7410, Mar. 3. 1986**

20 Exhibit 8, published in the Federal Register, addresses BLM's final rulemaking for
21 revisions to 43 C.F.R. §4700 et seq. As a Federal Register document, judicial notice is
22 appropriate. It is relevant in establishing that the current BLM regulations were adopted in 1986.

23 **I. 56 Fed. Reg. 786, January 9, 1991**

24 Exhibit 9, published in the Federal Register, addresses the 1991 amendments to BLM's
25 regulations. As a Federal Register document, judicial notice is appropriate. It is being submitted
26 to clarify that the 1991 amendments did not alter BLM's mandatory duty to create HMAPs.
27

J. 43 C.F.R. §4700 et seq. (1985)

Exhibit 10 contains the BLM regulations as of 1985—prior to adoption of the current regulations. It is a public document for which judicial notice is appropriate. It can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. It is relevant for purposes of interpreting the current regulations, demonstrating that prior to 1986, the regulations did not provide that HMAs shall be established for the maintenance of wild horse and burro herds, did not contain any language regarding HMAPs, and did not connect any land use or management plans with HMAs.

K. 49 Fed. Reg. 49252, Dec. 18, 1984

Exhibit 11, published in the Federal Register, is relevant for purposes of interpreting the current BLM regulations. It establishes that in 1984, BLM proposed changes to its regulations, introducing mandatory requirements for HMAs and HMAPs. It is relevant for addressing statutory construction of BLM's regulations.

For these reasons, Plaintiffs respectfully request this Court to take judicial notice of the documents attached to the declarations accompanying this motion.

DATED: December 15, 2023,

Respectfully Submitted,

/s/ Jessica L. Blome

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I electronically filed the foregoing Notice of Motion and Motion for Judicial Notice and Memorandum of Points and Authorities in Support Thereof with the Clerk of the U.S. District Court in the District Court of Nevada using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jessica L. Blome
Attorney for Plaintiffs